



OFFICE OF PERSONNEL MANAGEMENT

5 CFR PARTS 315 and 335

RIN 3206-AN28

Appointment of Current and Former Land Management Employees

AGENCY: Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing proposed regulations to implement recent statutory changes allowing certain employees and former employees of a land management agency to compete for a permanent position at such agency when the agency is accepting applications from individuals within the agency's workforce under promotion and internal placement (i.e., merit promotion) procedures, or at any hiring agency when the agency is accepting applications from individuals outside its own workforce under merit promotion procedures. These changes arose from enactment of the Land Management Workforce Flexibility Act ("the Act"), as amended by the National Defense Authorization Act for Fiscal Year 2017, and are codified at section 9602 of title 5. The intended effect of this rule is to facilitate the entrance of current and former land management employees into permanent Federal jobs.

DATES: Comments must be received on or before [INSERT 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by the docket number or Regulation Identifier Number (RIN) for this proposed rulemaking, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for sending comments.

All submissions must include the agency name and docket number or RIN for this rulemaking. Please arrange and identify your comments on the regulatory text by subpart and section number; if your comments relate to the supplementary information, please refer to the heading and page number. All comments received will be posted without change, including any personal information provided. Please ensure your comments are submitted within the specified open comment period. Comments received after the close of the comment period will be marked “late,” and OPM is not required to consider them in formulating a final decision. Before acting on this proposal, OPM will consider all comments we receive on or before the closing date for comments. Changes to this proposal may be made in light of the comments we receive.

FOR FURTHER INFORMATION CONTACT: Michelle T. Glynn, (202) 606-1571, by TDD: 1-800-877-8339, or email: michelle.glynn@opm.gov.

SUPPLEMENTARY INFORMATION:

Background

Federal agencies are authorized to make temporary appointments to fill positions that do not require an employee's services on a permanent basis, specifically positions to perform work which is not expected to last more than one year. Temporary employees are ineligible to compete for vacant positions advertised under promotion and internal placement (i.e., merit promotion) procedures because, by definition, temporary employees are not career or career-conditional employees (see 5 CFR 315.201). Generally, positions filled under merit promotion

procedures are open to current or former career or career-conditional employees and certain veterans eligible under the Veterans Employment Opportunities Act of 1998, as amended (see 5 CFR part 335). Because many agencies fill non-entry level jobs using merit promotion procedures qualified temporary employees may never be considered for these jobs. To remedy this circumstance Congress enacted the Land Management Workforce Flexibility Act (“the Act”) to provide a pathway for certain temporary employees in Federal land management agencies to compete for vacant permanent positions under merit promotion procedures.

Land Management Workforce Flexibility Act, as Amended

On August 7, 2015, the President signed the Land Management Workforce Flexibility Act, which was subsequently codified at 5 U.S.C. 9601 and 9602. On December 23, 2016, the President signed the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (“the Act”). Section 1135 of the Act amended section 9602 of title 5, United States Code. Collectively, these provisions established how a current or former employee of a “land management agency,” as defined by the Act, serving under a time-limited appointment, may compete for a permanent position in the competitive service -- either at such an agency, when the agency is accepting applications from individuals within the agency’s workforce under its merit promotion procedures, or at any agency, when the hiring agency is accepting applications from individuals outside its own workforce under the merit promotion procedures of the hiring agency. 5 U.S.C. 9602(a) and (d). In accordance with 5 U.S.C. 9602(e), which confers upon OPM authority to prescribe such regulations as may be necessary to carry out the Act, OPM is proposing that, for these purposes, “agency” can refer to either the highest organizational level (i.e., a Department as defined in 5 U.S.C. 105) or a component or major subdivision of a Department (e.g., the National Park Service within the U.S. Department of the Interior). Eligible

individuals (referred to in this notice of proposed rule-making as “land management eligibles”) must have served at an acceptable level of performance throughout the period(s) of time-limited appointment(s), have served under one or more time-limited appointments at a land management agency for a period or periods totaling more than 24 months without a break of two or more years, and the employee was appointed initially under open, competitive examination to the time-limited appointment. *Id.* A former employee of a land management agency who served under a time-limited appointment and who otherwise meets the requirements addressed in the statute, is also deemed to be a land management eligible, for purposes of the statute, if he or she applies for a position covered by these provisions within the period of two years after the individual’s most recent separation and such employee’s most recent separation was for reasons other than misconduct or performance. *Id.* The Act also waives any age requirements, unless the requirement is essential to the performance of the duties of the position. *Id.* at 9602(b).

Under the Act, a land management eligible may apply for a permanent position, at his or her current agency (or, in the case of a land management eligible who is a former employee, at the last land-management agency for which the employee worked, provided the employee is otherwise eligible and applies within a 2-year period following separation from that agency) when the hiring agency is accepting applications from individuals within the agency’s workforce under merit promotion procedures. A land management eligible may also apply for a permanent position at *any* agency (the agencies are not limited to land management agencies) when the hiring agency is accepting applications from individuals outside its workforce under the merit promotion procedures of the applicable agency. *Id.* at 9602(a). Lastly, the Act provides that individuals appointed under these provisions acquire competitive status upon appointment and

become career-conditional employees, unless the individual has otherwise completed the service requirements for career tenure. *Id.* at 9602(c).

As noted above, the Act allows current and former employees of a land management agency who meet the definition of a land management eligible (and are otherwise qualified) to apply and compete for permanent positions in the competitive service when the hiring agency is accepting applications from outside its own workforce under merit promotion procedures. Thus, agencies will be expected to consider land management eligibles under such merit promotion procedures in accordance with 5 CFR part 335 (and may subsequently appoint such an individual, if selected). The Act also allows a current or former employee of a land management agency, who meets the definition of a land management eligible (and is otherwise qualified), to apply and compete for a permanent position at such agency when the agency is accepting applications from individuals within the agency's own workforce under merit promotion procedures. In that case, the employing (or formerly employing) land management agency also will be expected to consider land management eligibles under such merit promotion procedures in accordance with part 335. When considering applicants under the Act, agencies must adhere to their merit promotion procedures and any applicable and enforceable collective bargaining agreement(s) into which the agency may have entered. This means land management eligibles must be rated and ranked with other merit promotion candidates under the same assessment criteria as the other applicants. The appointing official may select any candidate from among the best qualified group of applicants, consistent with the procedures in 5 CFR part 335, and part 330 for displaced employees.

To implement the newly created section of title 5 U.S.C. 9602, OPM is proposing to add a new § 315.613 to subpart F of part 315, title 5, Code of Federal Regulations, and revise part

335, Promotion and Internal Placement. Below is section-by-section description of the proposed provisions.

OPM is proposing to add a new § 315.613, as follows:

Description of the Flexibility

Paragraph (a) of proposed new § 315.613 explains the conditions under which an agency may use this authority to allow a current or former land management eligible initially hired at a land management agency under a time-limited appointment in the competitive service to compete for a permanent position at the land management agency when it is accepting applications from individuals within the agency's workforce under its merit promotion procedures, or at any agency when the hiring agency is accepting applications from individuals from outside its own workforce under merit promotion procedures. As a result of 5 U.S.C. 9602, an agency must consider a land management eligible, as defined by these regulations, who applies for a permanent position pursuant to the provisions of the Act and these regulations.

Definitions

Paragraph (b) of proposed § 315.613 contains four definitions necessary for the administration of this section. OPM is proposing that "agency" has a meaning consistent with 5 U.S.C. 105, or means a major subdivision or component of an entity defined in 5 U.S.C. 105 (e.g., the National Park Service within the U.S. Department of the Interior).

For the convenience of the reader, OPM is proposing to include the definition of "land management agency" as it is defined in the Act. For these purposes, a "land management agency" means the:

- Forest Service of the U.S. Department of Agriculture;
- Bureau of Land Management of the U.S. Department of the Interior;
- National Park Service of the U.S. Department of the Interior;
- Fish and Wildlife Service of the U.S. Department of the Interior;
- Bureau of Indian Affairs of the U.S. Department of the Interior; and
- Bureau of Reclamation of the U.S. Department of the Interior.

OPM is using the term “land management eligible” to refer to a Federal employee who would be in a position to take advantage of the opportunity the Act affords certain current or former employees. OPM is defining “land management eligible” to mean an individual who is serving or has served in a land management agency and who meets the following conditions:

For current land management employees (i.e., individuals currently employed in a land management agency) the individual:

- must have been initially hired under a time-limited appointment in the competitive service at the land management agency;
- must have served under 1 or more time-limited appointments at a land management agency for a period or periods totaling more than 24 months without a break in service of 2 or more years; and
- must have performed at an acceptable level during each period of service.

For former land management employees (i.e., individuals formerly employed in a land management agency) the individual:

- must have been initially hired under a time-limited appointment in the competitive service at the land management agency;

- must have served under 1 or more time-limited appointments by a land management agency for a total period of more than 24 months without a break in service of 2 or more years;
- must have performed at an acceptable level throughout the service period(s);
- must apply for a position covered by these provisions within 2 years from the end of the most recent date of separation; and
- must have been separated, with respect to the most recent separation, for reasons other than misconduct or performance.

A former land management employee's eligibility for appointment derives from the fact that the employee previously worked in a land management agency. For purposes of this regulation, a former employee who meets the above requirements is treated as if the individual is a current employee of the land management agency from which he or she was most recently separated.

OPM is proposing to define "time-limited appointment" as a temporary or term appointment as defined in 5 CFR part 316.

The following graphics summarize who is eligible to apply, to which agencies, and under which conditions (assuming the individual is otherwise eligible):

| | Current Agency | Any Federal agency |
|---|---|---|
| Current land management employee | When the agency is accepting applications from individuals from within its own workforce under merit promotion procedures | When the agency is accepting applications from individuals outside its own workforce under merit promotion procedures |

| | Agency last separated from | Any Federal agency |
|--|---|---|
| Former land management employee | When the agency is accepting applications from individuals from within its own workforce under merit promotion procedures | When the agency is accepting applications from individuals outside its own workforce under merit promotion procedures |

Conditions

Paragraph (c) of proposed § 315.613 specifies, in accordance with the Act, that, for the purposes of this Act, a hiring agency must waive requirements as to age, in determining an applicant's eligibility, unless the hiring agency can prove that the requirement is essential to the performance of the duties of the position being filled.

Acquisition of competitive status

For the convenience of the reader, paragraph (d) of new §315.613 repeats language from the Act which explains that these employees acquire competitive status immediately upon appointment.

Tenure on appointment

For the convenience of the reader, paragraph (e) of new § 315.613 repeats language from the Act which specifies that an employee appointed under these provisions becomes a career-conditional employee unless the individual has already completed the service requirements for career tenure in accordance with 5 CFR part 315.201.

OPM is proposing to add a new § 335.107 as follows:

Agency Authority

Paragraph (a) of proposed § 335.107 explains the purpose of the Act, which is to allow a land management eligible at a land management agency to apply and compete for a permanent position at any agency, when the hiring agency is accepting applications from individuals from outside its own workforce under merit promotion procedures, or at the eligible's land management agency, when such agency is accepting applications from individuals within the agency's workforce under its own merit promotion procedures.

Definitions

Paragraph (b) of proposed § 335.107 contains one definition for the administration of this section. OPM is proposing that "land management eligible" have the same meaning as the definition contained in proposed § 315.613(b)(3).

Regulatory Impact Analysis

OPM has examined the impact of this rulemaking as required by Executive Order 12866 and Executive Order 13563, which directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with economically significant effects of \$100 million or more in any one year. While this rulemaking does not reach the economic effect of \$100 million or more under Executive

Order 12866, this rulemaking is still designated as a “significant regulatory action,” under Executive Order 12866 and has been reviewed by OMB.

Reducing Regulation and Controlling Regulatory Costs

This rule is not an EO 13771 regulatory action because this rulemaking is related to agency organization, management, or personnel.

Regulatory Flexibility Act

The Office of Personnel Management certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities because it applies only to Federal agencies and employees.

Federalism

The Office of Personnel Management has examined this rulemaking in accordance with Executive Order 13132, Federalism, and have determined that this rulemaking will not have any negative impact on the rights, roles and responsibilities of State, local, or tribal governments.

Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rulemaking will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of nonagency parties and, accordingly, is not a “rulemaking” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

Paperwork Reduction Act

This rulemaking does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act.

List of Subjects in 5 CFR 315 and 335

Government employees.

Office of Personnel Management.

Alexys Stanley,
Regulatory Affairs Analyst.

Accordingly, OPM is proposing to amend parts 315 and 335 of title 5, Code of Federal Regulations, as follows:

PART 315 – CAREER AND CAREER CONDITIONAL EMPLOYMENT

1. The authority citation for part 315 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, and 3302; E.O. 10577, 3 CFR, 1954-1958 Comp. p. 218, unless otherwise noted; and E.O. 13162. Secs. 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 3652. Secs. 315.602 and 315.604 also issued under 5 U.S.C. 1104. Sec. 315.603 also issued under 5 U.S.C. 8151. Sec. 315.605 also issued under E.O. 12034, 3 CFR, 1978 Comp. p.111. Sec. 315.606 also issued under E.O. 11219, 3 CFR, 1964-1965 Comp. p. 303. Sec. 315.607 also issued under 22 U.S.C. 2560. Sec. 315.608 also issued under E.O. 12721, 3 CFR, 1990 Comp. p. 293. Sec. 315.610 also issued under 5 U.S.C. 3304(c). Sec. 315.611 also issued under 5 U.S.C. 3304(f). Sec. 315.612 also under E.O. 13473. Sec 315.613 also issued under Pub. L. 114-47, sec. 2(a) (Aug. 7, 2015), amended by Pub.L. 114-328, sec. 1135 (Dec. 23, 2016), as codified at 5 U.S.C. 9602. Sec. 315.708 also issued under E.O. 13318, 3 CFR, 2004 Comp. p. 265. Sec. 315.710 also issued under E.O. 12596, 3 CFR, 1978 Comp. p. 264.

Subpart F - Career or Career Conditional Appointment Under Special Authorities

2. Add § 315.613 to subpart F to read as follows:

§ 315.613 Appointment of current and former land management eligibles serving under time-limited appointments.

(a) *Appointment of land management eligibles.* (1) Any agency –

(i) May appoint a land management eligible who is a current employee of a land management agency to a permanent position provided the land management eligible was selected from among the best qualified following competition under a merit promotion announcement open to candidates outside of the hiring agency’s workforce: and

(ii) May appoint a land management eligible who is a former employee of a land management agency to a permanent position provided

(A) The land management eligible applied for that position within the 2-year period following the most recent date of separation from a land management agency; and

(B) Was selected from among the best qualified following competition under a merit promotion announcement open to candidates outside of the hiring agency's workforce.

(2) In addition, a land management agency--

(i) May appoint a land management eligible who is a current employee of that agency to a permanent position provided the land management eligible was selected from among the best qualified following competition under a merit promotion announcement open to candidates within that agency's workforce; and

(ii) May appoint a land management eligible who is a former employee of that land management agency to a permanent position provided --

(A) The land management eligible applied for that position within the 2-year period following the most recent date of separation from a land management agency;

(B) The land management agency from which the land management eligible most recently separated is the same land management agency as the one making the appointment; and

(C) The land management eligible was selected from among the best qualified following competition under a merit promotion announcement open to candidates within that agency's workforce.

(b) *Definitions*—(1) *Agency* has the meaning given in 5 U.S.C. 105, and may also mean a major subdivision or component of an entity defined in 5 U.S.C. 105.

(2) *Land management agency* means any of the following:

(i) The Forest Service of the U.S. Department of Agriculture;

(ii) The Bureau of Land Management of the U.S. Department of the Interior;

(iii) The National Park Service of the U.S. Department of the Interior;

(iv) The Fish and Wildlife Service of the U.S. Department of the Interior;

(v) The Bureau of Indian Affairs of the U.S. Department of the Interior; and

(vi) The Bureau of Reclamation of the U.S. Department of the Interior.

(3) *Land management eligible* means either:

(i) An individual currently serving in a land management agency who:

(A) Was initially hired under a time-limited appointment in the competitive service in accordance with part 316;

(B) Has served under 1 or more time-limited appointments by a land management agency for a period or periods totaling more than 24 months without a break in service of 2 or more years; and

(C) Must have performed at an acceptable level during each period of service; or

(ii) An individual who previously served in a land management agency who:

(A) Was initially hired under a time-limited appointment in the competitive service in accordance with part 316;

(B) Served under 1 or more time-limited appointments by a land management agency for a total period of more than 24 months without a break in service of 2 or more years;

(C) Performed at an acceptable level throughout the service period(s);

(D) Applied for a position covered by these provisions within 2 years after the individual's most recent date of separation from a land management agency; and

(E) Was separated, with respect to the individual's most recent separation, for reasons other than misconduct or performance. For these purposes, an individual under this paragraph is deemed an employee of the land management agency from which the individual was most recently separated.

(4) *Time-limited appointment* means a temporary or term appointment, in accordance with 5 CFR part 316.

(c) *Conditions*. An agency considering a land management eligible must waive any age requirement unless it can prove that the requirement is essential to the performance of the duties of the position.

(d) *Acquisition of competitive status*. A person appointed under paragraph (a) of this section acquires competitive status automatically upon appointment.

(e) *Tenure on appointment*. An appointment under paragraph (a) of this section is career-conditional unless the appointee has already satisfied the requirements for career tenure or is exempted from the service requirement pursuant to §315.201.

PART 335 – PROMOTION AND INTERNAL PLACEMENT

3. The authority citation for part 335 is revised to read as follows:

Authority: 5 U.S.C. 3301, 3302, 3330; E.O. 10577, 3 CFR 1954-1958 Comp., p. 218; 5 U.S.C. 3304(f); Pub.L. 106-117; Pub. L. 114-47, § 2(a) (Aug. 7, 2015), as amended by Pub.L. 114-328, § 1135 (Dec. 23, 2016), codified at 5 U.S.C. 9602.

Subpart A—General Provisions

4. Add § 335.107 to subpart A to read as follows:

§335.107 Special selection procedures for certain land management eligibles under merit promotion.

A current or former land management employee of a land management agency, who constitutes a land management eligible, as defined in § 315.613(b)(3), may, if otherwise qualified):

(a) Compete for a permanent position at any agency (including, but not limited to, a land management agency) when that agency is accepting applications from individuals outside its own workforce under merit promotion procedures in the competitive service; or

(b) At the land management agency with which it was most recently an employee, in accordance with the provisions of § 315.613, when the agency is accepting applications from individuals within the agency's workforce under its merit promotion procedures. A land management eligible so selected will be given a career or career-conditional appointment under § 315.613.